In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-342

DAVID HANDEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. 1a-5a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1972 (Pet. App. 6a). A petition for rehearing or rehearing *en banc* was denied on July 28, 1972 (Pet. App. 7a-8a). The petition for certiorari

was filed on August 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether on the facts of this case petitioner was denied his Sixth Amendment right to a speedy trial.

2. Whether testimony given by a co-conspirator concerning a prior perjury conviction relating to the events involved in this case constituted reversible error even in the absence of a proper objection during the trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to defraud the United States in the ascertainment and collection of revenue information necessary to determine petitioner's tax liability, in violation of 18 U.S.C. 371. Petitioner was acquitted of a substantive charge of causing the preparation and filing of a false information tax return in violation of Section 7206(2) of the Internal Revenue Code of 1954.

Petitioner was charged with participating in a scheme whereby his winnings from pari-mutuel "twin double" betting were reported in the names of various stand-ins who cashed winning tickets for him and completed the required information returns. To win the twin double it was necessary first to pick the winners in the sixth and seventh races. These tickets could then be exchanged for a new ticket containing

the bettor's choices for the eighth and ninth races. The evidence showed that petitioner purchased potentially winning tickets after the first two races had been run, and that, working through a middleman (often one Robert Elvin), petitioner had his winning tickets cashed by one of several individuals. When the winnings on a ticket exceeded $600, the race track was required to fill out an information tax return. In this manner, the winnings were reported in the name of the cashers and not in petitioner's name.

Robert Elvin, a co-defendant, pleaded guilty to the conspiracy count and testified for the government concerning petitioner's part in the scheme. Four of the seven cashers named in the conspiracy count also testified for the government, and each named petitioner as the bettor for whom the tickets were cashed (two received the tickets from Elvin).

The facts relevant to the speedy trial issue are these. The conspiracy alleged related to events that took place in 1964 and 1965. Petitioner was first questioned in 1965, and was initially arrested on a complaint on May 23, 1966. The complaint was formally dismissed on July 17, 1966, pending presentation of the case to a grand jury, when petitioner claimed it was causing him severe economic hardship. The indictment was returned on December 5, 1968. On June 2, 1969, petitioner moved for a bill of particulars to be furnished not later than 30 days prior to trial. On February 7, 1971, the government announced it would be ready for trial on April 1, 1971, subject to 20 days notice. On March 10, 1971, the

trial was set for October 4, 1971. On September 21, 1971, petitioner moved to dismiss the indictment, claiming denial of his right to a speedy trial.

The court of appeals affirmed the conviction, holding that petitioner was not deprived of his right to a speedy trial, that he was not prejudiced by the testimony of Elvin concerning his own perjury conviction, and that there was ample proof to support the jury's verdict. Only the first two holdings are in issue here.

ARGUMENT

1. Relying on *Barker* v. *Wingo*, No. 71-5255, June 22, 1972, petitioner contends (Pet. 6-12) that he was denied the right to a speedy trial. This claim was examined and rejected by the court of appeals, on the basis of a balancing process very similar to that set out in *Barker*, decided shortly after the court of appeals released its opinion.[1] Any difference between *Barker* and the decision below is one of phraseology, rather than substance. Indeed, rehearing and rehearing *en banc* were denied after this Court's decision in *Barker*. In *Barker* this Court emphasized that courts must "approach speedy-trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determin-

[1] *United States* v. *Marion*, 404 U.S. 307, and the Second Circuit rule as expressed in *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (C.A. 2), certiorari denied, 396 U.S. 936, appear to be the primary basis of the lower court's decision. *Mancusi* was cited with approval in *Barker* (slip op. 10-11, n. 23).

ing whether a particular defendant has been deprived of his right" (slip op. 16). Further review of the application of these factors to the facts of this case is not warranted.

Petitioner's primary contention is that substantial prejudice resulted from the death of a witness during the period of post-indictment delay. Petitioner claims this witness could have contradicted the testimony of five government witnesses, by testifying that he had not observed petitioner in their company at the race track. It is quite apparent, however, as expressed by the court of appeals (Pet. App. 4a), that at most only negative testimony was lost. The witness could not have exonerated petitioner and could only have testified to what he did not see. This would not have overcome the positive testimony of five government witnesses that they acted for petitioner in cashing his winning tickets.

The other factors listed in *Barker* also show that there was no Sixth Amendment violation. The length of the delay, as traced above, was not unreasonable. Although petitioner speaks of a five and a half year delay, the dismissal of the original complaint for petitioner's benefit warrants disregard of the post-arrest, pre-indictment interval, as the court below held. The subsequent period of about two years prior to announcement of readiness cannot be said to be unreasonable in preparing a conspiracy case for trial in a busy district.

Finally, throughout this period, the only act by the petitioner was the filing of a motion for a bill of

particulars to be furnished not later than 30 days prior to the trial. Not until a few weeks before the trial date, which had been scheduled months in advance and well after the government announced it was ready for trial, did petitioner assert that his speedy-trial right had been denied. Up to this point, petitioner had expressed no interest at all in bringing this matter to a head in a trial. While silence is not to be viewed as a waiver, this Court emphasized in *Barker*, that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial" (slip op. 18).

2. Petitioner's claim (Pet. 13-18) that he was denied a fair trial because of the introduction of testimony concerning the perjury conviction of a government witness is also without merit. Robert Elvin (the witness) had pleaded guilty to Count One of this same indictment charging petitioner with conspiracy, and Elvin was also found guilty by a jury of giving perjured testimony before the grand jury. These facts were brought out by the government on direct examination to prevent petitioner from arguing that the government was trying to withhold this information. The witness was then allowed to testify concerning the exact nature of the perjury. Had petitioner decided it would be best to prevent the jury from hearing such testimony at all, it could have been excluded on his proper request.[2]

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[2] "There may be circumstances where, *on proper request of the defense*, the trial judge should limit, or even bar such testimony, or allow it only under cautionary instructions be-

Having failed to make a proper objection to the introduction of the testimony,[3] petitioner now argues that this testimony was so prejudicial as to deny him a fair trial. Since petitioner vigorously pursued the question of the witness's perjury conviction on cross-examination in an effort to impeach him, it is obvious the government could have proved the nature of the conviction on redirect. Permitting the testimony concerning the nature of the perjury conviction to be mentioned on direct examination was at most harmless error. Lack of prejudice is also shown by the fact that there was testimony from four other witnesses who placed petitioner in the middle of the conspiracy.

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cause the prejudice to the defendant of the witness' admission of crime implicating the defendant would outweigh the advantages of a full disclosure of the witness' criminal background." (Emphasis added.) *United States* v. *Freeman*, 302 F. 2d 347, 350 (C.A. 2).

[3] The petitioner objected on the basis of the best evidence rule when the witness was asked what the conviction was about. There was no objection to the witness's testimony that he had a conviction. See *United States* v. *Indiviglio*, 352 F. 2d 276 (C.A. 2), certiorari denied, 383 U.S. 907.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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